Feminist Legal Studies (2007) 15:57–84
DOI 10.1007/s10691-006-9042-x

ANDREW N. SHARPE

ENDLESS SEX: THE GENDER RECOGNITION ACT 2004 AND THE PERSISTENCE OF A LEGAL CATEGORY

ABSTRACT. This paper challenges a view of the Gender Recognition Act 2004 as involving an unequivocal shift from the concept of sex to the concept of gender in law's understanding of the distinction between male and female. While the Act does move in the direction of gender, and ostensibly in an obvious way through abandoning surgical preconditions for legal recognition, it will be argued that the Act retains and deploys the concept of sex. Moreover, it will be argued that the concept of sex retained is not merely an anatomical understanding, but sex in a biological sense. In this respect the Gender Recognition Act can be viewed as embodying a tension between gender and sex. Further, it is contended that this tension is explicable in terms of irresolution of contrary legal desires to reproduce the gender order and to insulate marriage and heterosexuality from homosexuality in the moment of reform.

KEY WORDS: biology, disclosure, gender, homosexual, sex, transgender/transsexual

Introduction

This article aims to reflect upon transgender reform jurisprudence generally and on recent critical engagements with this corpus of the law occasioned by the passage of the Gender Recognition Act 2004. It offers itself as a pause. The need to take stock is necessitated by trends evident within transgender law reform, culminating in the Gender Recognition Act. In two recent articles published in this journal it has been argued that with the enactment of the Gender Recognition Act the concept of gender has replaced that of sex in comprehending and regulating the legal claims of transgender people (Cowan 2005; Sandland 2005; see also Sandland 2003; Cowan 2004). As Sandland puts it, with the Gender Recognition Act legal discourse shifts from ''biology to sociology or psychology'' or ''from sex to gender as the primary mechanism by which female and male are differentiated from each other'' (2005, p. 47). In a similar vein, Cowan contends that, ''in contradistinction to the development of

case law, new legislation in the U.K. has moved away from sex as the defining characteristic of sexual identity and embraced gender as its champion'' (2005, p. 75). Pursuing this theme Sandland argues that ''[i]t is a distinctly Butlerian approach which has been institutionalised and generalised in U.K. law'',[1] for within the provisions of the Act ''gender is the dynamic. 'Sex', if it is anything, is the product'' (2005, p. 47).[2] Moreover, he contends that the Act constructs ''a radical divide between the public and the private'' (2005, p. 52) whereby it is concerned only with:

> a public politics of the presentational, the proper appearance of the gendered body, which trades only in that which is on public display ... That which is below the surface, here the body of the person in question, is deemed beyond the sphere of public regulation. (2005, p. 52)

Ultimately, Sandland argues that the Act inaugurates a regime where ''for the purposes of the governmentability of gender, the body, and its biology, does not exist'' (2005, p. 52). Certainly, the Gender Recognition Act can be read in these terms given that it abandons, at least ostensibly, the hitherto transgender law reform requirement that legal recognition be contingent on the undertaking of sex (genital) reassignment surgery. Indeed, the Act appears to dispense with the need for surgery of any kind or, for that matter, hormonal treatments. In other words, what is significant about the Act on this account, and what distinguishes it from reform legislation and judicial decisions of other jurisdictions, is the fact that on its face it appears to dispense with the body. That is, not merely with biology (a

[1] See Butler (1993; 1990). While Butler argues that constructions of sex are always structured by a background and binary gender norm (1990, p. 7), she has sought to resist the charge of ''somatophobia'', a term coined by Spelman (1988, p. 126), by acknowledging that there are at least ''minimally, sexually differentiated parts, activities, capacities, hormonal and chromosomal differences that can be conceded without reference to 'construction'' (1993, p. 10). Yet, she has insisted that ''[t]o 'concede' the undeniability of 'sex' or its materiality is always to concede some version of 'sex,' some formation of 'materiality'' (1990, p. 10). For critiques of Butler's work charging her with elision of the body see, for example, Connell (1987, p. 74), Gatens (1996, p. 4), Prosser (1998, p. 41), Moi (1999, p. 30), Young (2005, pp. 4–12).

[2] Of course, in Butlerian terms, sex is always the product. Thus legal constructions of sex are always structured by a background and binary gender norm. This is as true for the notorious English decision of *Corbett v. Corbett* [1970] 2 All E.R. 33, with its biological fetishism, as it is for the Gender Recognition Act 2004. If there is a difference with the Act it lies not in the abstract claim that the concept of gender is more important than sex, but in law's recognition of this claim.

step well rehearsed within transgender law reform generally) but anatomy.

However, in this article I will offer a counter-reading of the Gender Recognition Act and will argue that it may be premature to conclude that English law has exchanged the category 'sex' for that of 'gender'. Certainly, the view that the Gender Recognition Act has inaugurated a shift from sex to gender needs to be situated within the context of a distinction between legal form and substance, a point to which I shall return. However, the argument I wish to develop here is that the Gender Recognition Act provides reason to think that a biological understanding of sex persists as an important subtext within the legislation. Moreover, it is contended that this fact is inextricably tied up with the homophobia of law.[3] Transgender reform jurisprudence should not, despite its claims to the contrary, be viewed as antithetical to a biological understanding of sex. For a biological understanding of sex is apparent within the case law in a variety of ways. These include insistence on a biological understanding of sex for the purposes of comprehending the pre-operative body,[4] the insulation of marriage from the effects of some reform decisions pertaining to other legal subject matters,[5] and judicial

[3] The term 'homophobia' was first coined in 1971 by George Weinberg (Weinberg, 1974). It was used to refer to irrational fears and panic in the face of homosexuality. Since then the term has taken on a variety of meanings and is now often used to refer to discrimination against gay men and lesbians. In this article I am using the phrase 'homophobia of law' to mean judicial fear or panic engendered around the homosexual body within the marriage context. The phrase refers to judicial anxiety evident within moments of uncertainty regarding the sexed status of parties to a marriage and correspondingly to uncertainty regarding the characterisation of sexual practice between the marital couple. While disapproval is certainly evident within law, transgender jurisprudence cannot be reduced to non-anxious disapproval of bodies and/or desires. On the contrary, legal anxiety appears to be especially notable when sex and/or sexuality is uncertain or unknown by a marriage partner. Thus the term homophobia captures an anxiety that goes to the heart of heterosexual identity and its ability to hold the subject of law together.

[4] The view that the pre-operative body should be indexed against biology has been a consistent feature of reform jurisprudence across jurisdictions. Thus, for example, in *M.T v. J.T.*, while recognising M.T., a post-operative male to female transgender woman as female, the court took the view that "a preoperative transsexual ... should be classified according to biological criteria" (355 A. 2d. 204 (1976) at 209).

[5] See, for example, the Australian decisions of *R. v. Harris and McGuiness* (1989) 17 N.S.W.L.R. 158 at 189 and *Secretary, Department of Social Security v. S.R.A.* [1993] 118 A.L.R. 467 at 495.

anxiety over non-disclosure of gender history prior to a marriage ceremony.[6]

From its inception transgender reform jurisprudence has been animated by the twin desires of reproducing the gender order and insulating marriage from the stain of homosexuality. While attempts to realise these desires have varied across jurisdictions and over time, they have remained relatively stable as regulatory ideals. A desire to reproduce the gender order has led to legal emphasis on the fixity or permanence of sex/gender crossings. Where reform has occurred, law has effectively granted a sex/gender amnesty to some transgender outlaws. However, this amnesty appears to be accompanied by a form of legal amnesia. That is to say, law engages in the practice of forgetting, and what it forgets or represses is precisely the facts that previously placed the beneficiary of the amnesty outside the law, namely, a disjunction between sex and gender as legally comprehended. Yet, that which is repressed in/by law tends to return in law's own textual practices in the form of anxiety. It is in this context that the homophobia of law, underscored by a biological understanding of sex, tends to return. Moreover, and in this respect, there appears to be a tension, if not a contradiction, in legal desire, one that accounts for judicial and legislative ambivalence regarding recognition in moments of reform. It is my contention that this analysis applies to reform jurisprudence generally and that it holds for the Gender Recognition Act. I take as my departure from recent critical interventions law's desire to insulate marriage from the stain of homosexuality.

Thus Sandland and Cowan are both correct in recognising that transgender law reform, and the Gender Recognition Act specifically, are structured by a desire to reproduce the gender order in binary terms. Indeed, the possibility of inaugurating a third term or gender position has consistently been rendered inconceivable within legal discourse. Thus the self-conscious occupancy of a gender position outside the binary has been variously described judicially as a "no

[6] Anxiety over non-disclosure of gender history prior to a marriage ceremony has proved to be a consistent feature of transgender jurisprudence. Non-disclosure has operated in such a way as to problematise transgender sex claims and has contributed to such claims being framed in terms of biological sex rather than gender. See, for example, *Anonymous v. Anonymous* 325 N.Y.S. 2d. 499 at 499 (1971) and *S.T. (formerly J.) v. J.T.* [1998] 1 All E.R. 431 at 441. It is contended that anxiety over non-disclosure of gender history is inextricably tied up with the homophobia of law, a theme I shall pursue in the section dealing with the Gender Recognition Act.

man's land",[7] "a far-out theory",[8] "novel",[9] "lacking in substance"[10] and as "some kind of sexual twilight zone".[11] However, the recent interventions of Sandland and Cowan attend less to law's other desire and the possibility that it might continue to inform the law reform moment. Before proceeding to consider this and other themes within the context of the Gender Recognition Act the article will explore the body of reform jurisprudence that precedes the Act in order to highlight law's twin desires, their never satisfactory resolution, and the emergence of the idea of sex as biology at the site of reform. To this end the article will consider three common law decisions as exemplars of key reform shifts. The decisions to be considered are the New Jersey decision of *M.T v. J.T.*,[12] the New Zealand decision of *Attorney-General v. Otahuhu Family Court*,[13] and the Australian decision of *Re. Kevin and Jennifer v. Attorney-General for the Commonwealth*.[14] While each decision strives to distance itself from *Corbett*, that English decision, when understood through the lens of homophobia, never really disappears from the horizon.[15] Moreover, while each decision narrates a test of *psychological and anatomical harmony*, each gives that test a quite different inflection.

M.T. v. J.T.: Sex as Heterosexual Capacity

Transgender law reform in the common law world dates to the late 1960s.[16] However, the most significant decision of the period, and the

[7] *M.T. v. J.T.*, *supra* n. 4, at 210 per Handler J.

[8] *Ibid.* Handler J. appears to quote directly from, and endorse, the view of Pecora J. in *Re. Anonymous* 293 N.Y.S. 2d. 834 (1968) at 837.

[9] *R. v. Harris and McGuiness*, *supra* n. 5, at 194 per Mathews J.

[10] *Ibid* at 170 per Carruthers J.

[11] *M. v. M.* [1991] N.Z.F.L.R. 337 at 347 per Aubin J. For a discussion of third or other genders see Monro (2005).

[12] *M.T. v. J.T.*, *supra* n. 4.

[13] *Attorney-General v Otahuhu Family Court* [1995] 1 N.Z.L.R. 603.

[14] *Re Kevin and Jennifer v. Attorney-General for the Commonwealth* [2001] Fam. C.A. 1074.

[15] The judgment of Ormrod J. is infused with homophobia. This is apparent in his analysis of April Ashley's pre-operative sexual practice, gender performance and post-operative sexual capacity as well as in his analysis of the sexual practice and desire of her marriage partner, Arthur Corbett (*Corbett v. Corbett*, *supra* n. 2, at 34–43, 48–50).

[16] See *Re. Anonymous, supra* n. 8.

first concerning determination of sexed status for the purposes of marriage, is the New Jersey decision of *M.T. v. J.T.* In this case the court had to consider the validity of a two-year marriage between a biological man and a post-operative male to female transgender woman. The court rejected the biological analysis adopted by Ormrod J. in the English decision of *Corbett v. Corbett*. That is, the court rejected a legal test that insisted sex is determined at birth with reference to congruence of chromosomal, gonadal and genital factors. Instead, the court preferred to articulate a test of *psychological and anatomical harmony* for determining sex. Here, what concerned the court was not the past but the present, in the shape of post-surgical reality. Accordingly, her anatomy having been brought into conformity with her psychology, M.T. was considered to be female for the purposes of marriage. However, and significantly, M.T.'s sex (genital) reassignment surgery did not, of itself, serve to assuage the anxiety of the court. Rather, the court placed particular emphasis on her post-operative sexual capacity:

> Implicit in the reasoning underpinning our determination is the tacit but valid assumption of the lower court and the experts upon whom reliance was placed that for the purposes of marriage under the circumstances of this case, it is the sexual capacity of the individual which must be scrutinized.[17]

In relation to M.T.'s sexual functioning the court explored in some detail her genital topography. Drawing on the medical evidence the court noted that M.T. had "a vagina and labia which were adequate for sexual intercourse and could function as any female vagina, that is, for traditional penile/vaginal intercourse".[18] We see here how, in addition to a requirement of sex (genital) reassignment surgery, law requires the production of a physical capacity for heterosexual intercourse. In this regard, law reform reproduces the gender order along phallocentric lines. While law is concerned over bodily aesthetics this concern proves insufficient. Ultimately, what governs the reform moment in *M.T. v. J.T.* is the sexual functioning of the body, not its aesthetic form.

The approach adopted in this case has led some legal feminist scholars to emphasise the fact that the legal construction of 'woman' is contingent on the capacity to be penetrated (see, for example, Robson 1998 p. 145; Robertson 1998, p. 1400; Collier 1995,

[17] *M.T. v. J.T.*, *supra* n. 4, at 209.

[18] *Ibid* at 206.

p. 149). However, despite the obvious phallocentrism of this reform approach to sex determination as well as its centrality to the decision, law's inspection of M.T.'s vagina also serves to highlight an aesthetic legal concern. Thus, judicial evaluation of her vagina, and its sexual adequacy, belie a concern to ensure that M.T.'s body is capable of being a locus, not only of male heterosexual pleasure, but of 'natural' pleasure. Thus, and again referring to the medical evidence, the court pointed out that M.T.'s vagina had been "lined initially by the skin of [her] penis", that it would, in all likelihood, later take on "the characteristics of normal vaginal mucosa", that it had a "good cosmetic appearance and was the same as a normal female vagina after a hysterectomy", and that though at "a somewhat different angle, [it] was not really different from a natural vagina in size, capacity and the feeling of the walls around it".[19] This mapping of M.T.'s genital region suggests a concern to 'naturalise' her vagina, and thereby the practice of heterosexual intercourse. That is to say, medico-legal discourse, in emphasising textural, spatial and sensual similarities between M.T.'s vagina and that of biological women, attempts to rearticulate the relation between the transgender body and the 'natural'. This view can be contrasted with Ormrod J.'s description of April Ashley's vagina in the *Corbett* decision as an "artificial cavity"[20] and his invocation of anal intercourse in characterising its use.[21]

Accordingly, and while the degree of attention paid to M.T.'s vagina suggests a degree of judicial ambivalence concerning its coding as natural and heterosexual, the decision highlights, and is structured around satisfying, law's twin desires. The particular legal construction of 'woman' in *M.T. v. J.T.* serves to reproduce the gender order through insisting on the coupling woman/vagina and through requiring a physical capacity to be penetrated. These features of the legal construction of 'woman' serve simultaneously to insulate marriage and heterosexuality from the possibility of homosexual contamination. This latter concern is also met by a medico-legal strategy that seeks to 'naturalise' M.T.'s vagina and therefore its heterosexual capacity.

[19] *M.T. v. J.T.*, *supra* n. 4, at 206.

[20] *Corbett v. Corbett*, *supra* n. 2, at 49.

[21] *Ibid.*

A.-G. v. Otahuhu Family Court: Sex as Bodily Aesthetics

The test of *psychological and anatomical harmony* underwent subtle reworking in the New Zealand decision of *Attorney-General v. Otahuhu Family Court*.[22] In this case the Attorney-General brought an application on behalf of the Registrar for Marriages, for

> a declaration as to whether two persons of the same genetic sex may by the law of New Zealand enter into a valid marriage where one of the parties to the proposed marriage has adopted the sex opposite to that of the proposed marriage partner through sexual reassignment by means of surgery or hormone administration or both or by any other medical means.[23]

The New Zealand High Court purported to follow the legal analyses in *M.T. v. J.T.* and other reform decisions, insisting that legal recognition of sex claims for marriage purposes was dependent on sex (genital) reassignment surgery. The court made it clear that bodily change brought about through hormone administration or other medical means was insufficient in this regard.[24]

However, it would be misleading to suggest that the decision in *Otahuhu* followed, in any simple way, previous decisions articulating the test of *psychological and anatomical harmony*. While *Otahuhu* shares much with prior reform recognising sex claims there is a striking difference. In *M.T. v. J.T.*, and in other decisions, the courts have insisted that legal recognition is dependent on, not merely sex reassignment surgery, but also, post-operative capacity for heterosexual intercourse. In *Otahuhu* however, while Ellis J. stated "that in order to be capable of marriage two persons must present themselves as having what appear to be the genitals of a man and a woman",[25] he insisted that they did not "have to prove that each can function sexually".[26]

Accordingly, while law's continued insistence on articulating a 'wrong body' story points to a legal desire to reproduce the gender order, it would seem that emphasis within critical legal scholarship on the production of heterosexual capacity to that end is, perhaps, overstated. While Ruthann Robson is right in stating that a continued

---

[22] *Attorney-General v. Otahuhu Family Court*, *supra* n. 13.

[23] *Ibid.*

[24] *Ibid* at 614–615.

[25] *Ibid* at 612.

[26] *Ibid.*

requirement of sex reassignment surgery typically has the effect of producing heterosexual capacity (1998, p. 145), and while this fact is clearly not lost on the court, it is clear that the decision cannot be reduced to an assumption about the expected use of that capacity. In short, the uncoupling of sex reassignment surgery from the capacity for heterosexual intercourse in *Otahuhu* represents an architectural shift within transgender jurisprudence from functionality to aesthetics. To collapse this distinction is to miss the insight that it offers as to the purpose of sex reassignment surgery as legally comprehended.

While an aesthetic concern over bodies is a consistent theme of transgender jurisprudence it is usually masked, at least partially, by a preoccupation with heterosexual capacity. In the judgment of Ellis J. however, law's anxiety over bodily aesthetics is foregrounded. Irrespective of sexual functioning, and guided by an obvious genitocentrism, Ellis J. seeks, and finds, reassurance in the fact that the male to female post-operative body "can never appear unclothed as a male"[27] and that the female to male post-operative body "can no longer appear unclothed as a woman".[28] Absent a concern over sexual functioning, law's view of the phallic female body as monstrous becomes all the more evident, as does the homosexual sign it emits in the legal imaginary. In other words, transgender people are required to undergo "a risky surgical procedure",[29] not in order that they might penetrate/be penetrated, or at least the decision in *Otahuhu* is not directed primarily to that end. Rather, surgery appears to be necessary precisely in order that transgender bodies accord with law's aesthetic sensibility, thereby reducing homophobic anxiety. In other words, the decision is directed less toward heterosexual obligation than to prohibition of 'unnatural' homosexual practice that 'non-complementary' bodies suggest. That is to say, in *Otahuhu*, law's re-sexing practices are premised, perhaps, on the absence rather than the presence of particular forms of sexual practice. Thus the decision suggests that heterosexual capacity is not crucial to the legal construction of sex. By the same token, the production of heterosexual capacity would not appear to be necessary to reproducing the gender order or to insulating marriage and heterosexuality from homosexual practice. It would seem that heterosexual capacity is surplus to legal desire.

[27] *Ibid* at 607.

[28] *Ibid* at 615.

[29] *Ibid* at 614.

Re. Kevin: Sex as Non-genital Surgery

The extent of common law reform to date is most evident in the decision of the Family Court of Australia in *Re. Kevin and Jennifer v. Attorney-General for the Commonwealth*.[30] In this case Chisholm J. held Kevin, a female to male transgender man, to be a man for the purposes of Australian marriage law. The most celebrated feature of the decision is that Kevin's sex claims were recognised despite the fact that he had not undertaken phalloplastic surgery, though he had undertaken breast reduction surgery and a total hysterectomy. In other words, Kevin lacked a penis. Prior reform jurisprudence, as I have already detailed, has always insisted on reproducing the couplings of man/penis and woman/vagina, whether that has led to an emphasis on sexual functioning or bodily aesthetics. In *Re. Kevin*, what might be described as a genitocentric legal imperative appears to have been abandoned. Accordingly, the decision might be viewed as presenting some difficulty for a thesis that places emphasis on a legal desire to insulate marriage and heterosexuality from homosexuality.

Yet, a close textual reading of *Re. Kevin* suggests otherwise. For this decision is not a linear tale, a tale of progress. Indeed, the decision differs considerably, and in an unfavourable way, from prior reform decisions. This is because the criteria for determining sex are reconfigured in *Re. Kevin*. That is, Chisholm J. introduces into the mix two factors previously considered irrelevant within reform jurisprudence, namely biological and social/cultural factors. First, great emphasis is placed on biological evidence concerning 'brain sex'. Specifically, reliance is placed on the medical science of endocrinol-

[30] *Re. Kevin, supra* n. 14. The decision of the Family Court of Australia was unanimously upheld on appeal to the Full Court of the Family Court ([2003] Fam.C.A. 94). For a more detailed analysis and critique of this decision see Sharpe (2002a). A case similar on its facts was decided in Florida in the same year (*Kantaras v. Kantaras* (2003) 6th Judicial Circuit in and for Pasco County, Florida, 21 February). However, it was unanimously overturned on appeal with the appeal court preferring to adopt a *Corbett* style analysis (*Kantaras v. Kantaras* (2004) Fla. App. 2 Dist., 23 July). Interestingly, in the *Kantaras* case emphasis was placed on medical evidence that Michael Kantaras (a female to male transgender man) did not have a typically female vagina because as a result of hormone therapy he now had "a penis or enlarged, enlongated clitoris" (2004, p. 2). Moreover, Dr. Bockting noted that a penis/enlarged clitoris "does well up during sexual excitement, it is erectile tissue" and that "some patients reported they're able to have sexual intercourse with it" (2003, p. 281). In other words, in contrast to *Re. Kevin*, recognition of a vaginaed man is less clear-cut.

ogy and the scientific argument that gender identity is causally linked to the reception of hormones during the first three months of pregnancy (Gooren et al., 1995; 2000).[31] Indeed, and while there remains a lack of medical consensus regarding the 'brain sex' hypothesis,[32] Chisholm J. went so far so as to suggest that:

> the characteristics of transsexuals are as much 'biological' as those of people thought of as inter-sex. The difference is essentially that we can readily observe or identify the genitals, chromosomes and gonads, but at present we are unable to detect or precisely identify the equally 'biological' characteristics of the brain that are present in transsexuals.[33]

I do not mean here to challenge the validity of this science. Rather, I simply note that the legal determination of sex need not rely on, or be over-determined by, scientific findings. Reform prior to *Re. Kevin* exemplifies this point. In emphasising 'brain sex' the decision reorients the relationship between sex and truth. In contrast to decisions such as *M.T. v. J.T.* and *Otahuhu*, which insist on the present and post-surgical moment as the one in relation to which sex is to be determined, *Re. Kevin* provides support for the view that sex is determined at birth. In this regard the spectre of the *Corbett* decision haunts the reform moment.

The other factor introduced in *Re. Kevin*, and previously absent within reform jurisprudence, is a social/cultural factor. Thus, central to the legal determination of Kevin's sex was substantial affidavit evidence provided by Kevin's friends, acquaintances, family and work colleagues that Kevin was, and had always been perceived to be, a man.[34] It is not the gender stereotypical nature of much of this

[31] *Ibid* para. 244. According to this argument genetically male transsexuals possess a female brain structure while genetically female transsexuals possess a male brain structure. This claim is said to support the hypothesis that gender identity develops as a result of an interaction of the developing brain and sex hormones. The tiny region of the brain that has been scrutinised is the central subdivision of the bed nucleus of the *stria terminalis*, known as BSTc. It is the part of the hypothalamus that helps to keep the different systems of the body working in harmony and which is viewed as essential for sexual behaviour. This area of the brain is ordinarily larger in men than in women, while in transsexuals post-mortem studies suggest that size corresponds with assumed gender.

[32] A lack of medical consensus on this question has been noted by the European Court of Human Rights (see, for example, *X., Y. and Z. v. U.K.* (1997) 24 E.H.R.R. 143 at 171–172; *Sheffield and Horsham v. U.K.* (1998) 27 E.H.R.R. 163 at 192).

[33] *Re. Kevin, supra* n. 14, at paragraph 272.

[34] *Ibid* paras. 48, 50, 51, 57, 59, 68, 320.

evidence that I wish to emphasise. Rather, it is the fact that the very question of Kevin's sex depended on such considerations. In this respect, reformism inaugurates an expansion of gatekeepers, which transgender people intent on legal recognition must negotiate. While a gate-keeping function was confined to medicine and law within past reform, *Re. Kevin* extends that function to the 'community,' a move that contains the potential for further erosion of transgender autonomy.

In thinking about *Re. Kevin* we are forced to ask why biological and social/cultural factors enter a legal corpus where they had previously been absent, and assume such prominence, and in the case of social/cultural factors, such centrality? In much the same way that the court in *M.T. v. J.T.* sought to 'naturalise' M.T.'s body through close scrutiny of her vagina and its favourable comparison to that of biological women, resort to biology and the temporal moment of birth functions to 'naturalise' and thereby heterosexualise Kevin's male body. By the same token the introduction of *social* and *cultural* elements might be seen in terms of assuaging legal appellate, broader community and cultural anxiety concerning the boundary between transgender and homosexuality. Moreover, it is precisely in the context of legal recognition of a vaginaed man, and the anxiety that arouses, that resort to biology and social/cultural factors might best be comprehended. In other words, in departing from the coupling man/penis, the desire to ground Kevin's identity in the past (both biologically and socio-culturally) perhaps takes on special importance. It is significant that the most 'progressive' common law case to date, and the most 'progressive' instance of law reform prior to the Gender Recognition Act contains these elements, and especially that it is informed by a biological understanding of sex. Finally, it should be borne in mind that Kevin had undertaken a variety of invasive (though non-genital) surgical procedures, and that this fact proved crucial to his legal recognition as a man. For in Chisholm J'.s view, "the irreversible surgery that completes the sex-reassignment process provides a convenient and workable line for the law to draw".[35] Accordingly, *Re. Kevin*, while inflecting the test of *psychological and anatomical harmony* in yet another way, does not transcend this reform test. It is against this background of common law reform that analysis of the recent Gender Recognition Act needs to be situated.

[35] *Ibid* para. 321.

That is to say, the legislation needs to be understood in the context of legal desires that enable, structure and limit reform.

The Gender Recognition Act

The Gender Recognition Act is clearly a positive enactment in a number of respects. Most obviously it, at least ostensibly, or at the level of legal form, dispenses with any requirement to undergo surgery of any kind, or indeed take prescribed hormones. In this respect, the Act departs considerably from Dewar's observation that, absent surgery, it is hard to imagine how "legal sex reassignment could take place given the need for objectivity and a point in time" (1985, p. 63). This is positive in the sense that not all transgender people feel the need to take such measures in order to feel that they inhabit the correct gendered body. It is also positive in the sense that some individuals who would like to take such measures are unable to do so due to financial reasons and/or medical contraindications to undergoing surgery. This is perhaps especially the case with regard to female to male transgender men. Thus Garber has noted that phalloplastic procedures are "not easily accomplished", are "fraught with rather serious hazards" and are "still quite primitive and experimental" (1989, p. 148).[36] The Act is also welcome in that, unlike *Re. Kevin*, it does not introduce the additional regulatory gatekeeper of the 'community'.[37] Nor does it make reference to 'brain sex' science, albeit champions of reform repeatedly placed emphasis on precisely this science during the parliamentary debates. Indeed, the Honourable Lynne Jones, Chair of the Parliamentary Forum on Transsexualism, in addition to emphasising "brain identity",[38] felt able, drawing on the medical evidence, to "say with confidence that transsexualism should be regarded as an

[36] See Walters, Kennedy & Ross (1986) for a more detailed medical discussion of such procedures and their limits. Medical difficulties with surgery for some individuals were noted in the parliamentary debates (see, for example, Lord Filkin, House of Lords 2nd Reading 18 Dec. 2003, Col. GC10).

[37] There was an unsuccessful attempt to incorporate into the legislation a requirement that "the applicant's blood relatives and other persons with a major interest in his welfare [be] afforded the opportunity to make representations to the Panel" (the Honourable Mr. Boswell, House of Commons Standing Committee A, 9 March 2004, Col. 42).

[38] The Honourable Lynne Jones, House of Commons Standing Committee A, 11 March 2004, Col. 136.

intersex condition''.[39] Finally, because legal recognition of sex claims does not require surgery or hormones, the Act does not demand the sterilisation of transgender people. This can be contrasted with other jurisdictions where sterilisation is formally required[40] or operates in a de facto manner.

Despite all these positive features, it is my contention that a biological understanding of sex remains, in an important sense, a subtext within the Act. However, before developing this claim it is important to detail other difficulties with the legislation. The Act has been objected to for two principal reasons. First, a successful application for a Gender Recognition Certificate requires an applicant who is pre-operative to demonstrate gender dysphoria.[41] In this regard the legislation furthers a mental illness model for comprehending transgender embodiment (Cowan 2005, pp. 76–77; Sandland 2005, p. 49; and see more generally Butler 2004, ch. 4; Sharpe 2002b, p. 30; Whittle 2002, p. 38). Second, in addition to pathologising transgender people, the Act requires married transgender persons to divorce in order to gain a full Gender Recognition Certificate (Cowan 2005, p. 76).[42] This provision was the cause of considerable consternation in both Houses. It was criticised as inhumane and as destructive of the family.[43] As one parliamentarian put it: ''I can think of no other circumstance in which the state tells a couple who are married and who wish to remain married that they must get divorced''.[44] Nevertheless, it was retained for the explicit purpose of insulating marriage from homosexual incursion. In the words of the then Parliamentary Under-Secretary for Constitutional Affairs, David Lammy, ''it is the Government's firm view that we cannot allow a small category of

[39] *Ibid.*

[40] By way of example, sterilisation is formally required in Germany, Denmark, Sweden and the Netherlands. For a discussion of this issue see Whittle (1998).

[41] Sections 2(1)(a) and 3(2). This is not necessary for an applicant applying under the fast track process on the basis of ''having undergone surgical treatment for the purpose of modifying sexual characteristics'' (s. 27(2)) (see *infra* n. 50).

[42] Sections 3(6)(a) and 4(3).

[43] See, for example, the Honourable Dr. Harris, House of Commons Standing Committee A, 9 March 2004, Col 60.

[44] The Honourable Hugh Bayley, House of Commons 2nd Reading 23 February 2004, Col. 60; the Honourable Andrew Selous, House of Commons 2nd Reading 23 February 2004, Col. 64.

same-sex marriages'',[45] a position replicated through the introduction of civil partnerships as an institution distinct from marriage.[46]

In addition to these objections it is clear that the Act requires of transgender people not only that they live in their acquired gender for a two-year period,[47] but also that they ''intend to continue to live in the acquired gender until death''.[48] Here it is apparent that the law requires permanent, even if apparently non-surgical, crossings. In this regard, the Act clearly aims to reproduce a binary gender order. In the words of David Lammy, ''individuals will not be able to skip from one gender to another''.[49] As Sandland notes, the provision serves to ''divid[e] the transgendered community from itself; the 'lifers' from the rest'' (2005, p. 50). Further, the requirement to live in the acquired gender for a two-year period, the so-called ''real life test'', points to gendered rites of passage, issues of passing and the negotiation of medical gatekeepers, important feminist and transgender issues well documented in the literature (see, for example, Kaveney 1999, p. 151; Griggs 1998, p. 31; Lewins 1995, p. 103; King 1993, p. 85; Cole and Birrell 1990, p. 5; Bolin 1988, pp. 107–108; Billings and Urban 1982, p. 275).

It is also necessary to invoke a distinction between legal form and substance in thinking about the legal regulation of transgender people under the Gender Recognition Act. While on its face the Act does not require applicants to undergo surgery of any kind, it is clearly the expectation of the government that surgery will occur. This point is made manifest in a variety of ways. In the first place there are two avenues for applying for a Gender Recognition Certificate under the fast track application process that operates for the first two years of

[45] The Honourable David Lammy, House of Commons Standing Committee A, 9 March 2004, Col. 69. It was suggested in the debates that the number of transgender people who have undertaken gender reassignment and who are currently living in a marriage was no more than between 150 and 200 (the Honourable Mr. Oaten, House of Commons 2nd Reading 23 February 2004, Col. 69).

[46] Civil Partnership Act 2004. For a discussion of this legislation see Stychin (2006) and Barker (2004).

[47] Section 2(b). An applicant is required to make a statutory declaration that the requirements stipulated in ss. 2(b) and 2(c) are met (s. 3(4)).

[48] *Ibid* s. 2(c).

[49] *Supra* n. 45, Col. 18.

hearing applications.[50] First, an applicant can apply on the basis of having ''undergone surgical treatment for the purpose of modifying sexual characteristics''.[51] This avenue is clearly the one under which the Government expects most transgender people to apply.[52] As David Lammy explained in the House of Commons: ''ultimately [transsexuals] have surgical treatment if it is viable''.[53] No precise definition of ''surgery'' is provided. Moreover, while non-genital surgery may be sufficient, a medical report is required ''to explain why no further surgery was undertaken''.[54] Equally, the second and non-surgical basis of application under the fast track process, namely, ''having, or having had, gender dysphoria'',[55] requires a medical report to explain why no surgical intervention has occurred.[56] In other words, both avenues of application presuppose a surgical outcome, and indeed, an outcome in which genitalia are transformed, as the proper end of the transsexual journey. In relation to phallic woman and vaginaed men, each avenue serves to reproduce a 'wrong body' story. Moreover, in the case of an applicant who has not undertaken surgery, the possibility remains, both in relation to fast track and standard applications, that this fact may hinder a diagnosis of gender dysphoria. For failure to resort to surgery ''might, just possibly might, have a bearing on the seriousness of intent''.[57]

---

[50] Section 27(1). The 'fast track' process ''is intended to enable those transsexual people who have lived for a long time in their acquired gender to take advantage of legal recognition first'' and, in contrast to a standard application, requires only one rather than two medical reports. It is available to those transsexuals who have lived in their acquired gender role for at least six years at the date of application (Gender Recognition Panel (G.R.P.) Guidance on Completing the Application Form for a Gender Recognition Certificate, s. 6) http://www.grp.gov.uk/forms_guidance/documents/guide_fasttrack_0306.pdf

[51] This avenue of application requires a medical report attesting to the surgical treatment undertaken and any further treatment that the applicant intends to undertake (G.R.P. Guidance document, *ibid*). While in relation to 'standard' applications, proof of gender dysphoria is explicitly required (s. 3(2)) in addition to evidence of any surgery (s. 3(3)(a)), this is not required in relation to fast track applications. In relation to fast track applications, surgery serves as an alternative to a diagnosis of gender dysphoria (s. 27(2)).

[52] Lord Filkin, *supra* n. 36.

[53] *Supra* n. 45, Col. 19.

[54] G.R.P. Guidance document, *supra* n. 50.

[55] *Ibid.*

[56] *Ibid.*

[57] Lord Filkin, *supra* n. 36.

According to Press for Change, the leading U.K. transsexual advocacy group, "the rejection rate is very low"[58] for applicants applying for a Gender Recognition Certificate. However, this assessment is based on anecdotal evidence in the form of emails received from satisfied applicants. The Gender Recognition Panel figures indicate only whether a final decision has been made.[59] They do not provide information as to rates of success or failure. Moreover, Press for Change note at least one case of rejection having come to their attention.[60] Perhaps of greater significance, the Gender Recognition Panel figures provide no information as to whether any of the applications received have come from pre/non-surgical transgender applicants.

However, none of these difficulties address the claim that sex as biology informs the legislation. Even if one were to accept an argument about a disjunction between legal form and substance it would only lead to the conclusion that an understanding of sex as anatomy (as distinct from biology) underscores the Act. Yet, there is a provision of the legislation that suggests something different. Moreover, it is my contention that this provision is explicable in terms of the homophobia of law. While it is easy to see how the Gender Recognition Act, through its requirement of a permanent crossing, reproduces a binary understanding of gender, it is less clear how the Act gives effect to the homophobia of law, other than, of course, through its treatment of married transgender people.[61] However, the refusal to grant married transsexuals a full Gender Recognition Certificate is not explicable in terms of a biological understanding of sex. Rather, in order to appreciate a connection between the Gender Recognition Act and a biological understanding of sex we must look to section 11 of the Act. Section 11 gives effect to schedule 4 to the Act. Crucially, paragraphs 4 and 5 of schedule 4 amend section 12 of the Matrimonial Causes Act 1973 to add a new ground for rendering a marriage voidable, namely: "That the respondent is a person whose

[58] http://www.pfc.org.uk/pfclists/news-arc/2005q3/msg00022.htm

[59] *Ibid.* According to Press for Change, as of 13 July 2005 the Gender Recognition Panel had received 668 applications and had issued 459 decisions.

[60] *Ibid.* Apparently that individual had "chosen not to supply any medical evidence at all, which made it impossible for the panel to accept her application".

[61] The Act makes the grant of a full Gender Recognition Certificate conditional on divorce in the case of those transgender persons already married prior to its enactment (ss. 3(6)(a) and 4(2)). However, married transgender persons may apply for an interim Gender Recognition Certificate (s. 4(3)).

gender at the time of the marriage had become the acquired gender under the Gender Recognition Act 2004''.[62] The Explanatory Notes to the Act provide further detail as to how this section is to operate. Thus where: ''At the time of the marriage one party to the marriage did not know that the other was previously of another gender, the former may seek to annul the marriage''.[63]

It is this provision, dealing with non-disclosure of gender history, which is perhaps the most revealing aspect of the legislation. For it points not only to underlying homophobia, an aspect of the legislation rendered most visible by the exception pertaining to married transsexuals, but also to a biological understanding of sex. It is perhaps in this provision that we witness the return of this legal 'truth'. Turning first to the linked issue of the homophobia of law, the provision reproduces a frequently expressed common law, and wider cultural, anxiety over the ever-present possibility of inadvertent communion with the homosexual. In cases where disclosure of gender history has occurred the courts have given particular emphasis to this fact and it has served both as a source of judicial relief and as a factor in moments of legal recognition.[64] In cases where transgender individuals have not disclosed their gender history prior to marriage, legal anxiety has proved to be especially evident. For example, in the New York contested marriage case of *Anonymous v. Anonymous*,[65] the court noted that on the night of his wedding, the biologically male plaintiff soldier ''awoke at 2 o'clock in the morning, reached for the defendant [a pre-operative male to female transgender woman] and upon touching the defendant, discovered that the defendant had male

[62] Paragraph 5 of schedule 4 adds a new subsection (h) to s. 12 Matrimonial Causes Act 1973.

[63] Paragraph 42, Explanatory Notes to the Act, http://www.opsi.gov.uk/acts/en2004/2004en07.htm. A provision pertaining to non-disclosure of gender history is also present in the Civil Partnerships Act 2004. Thus, a civil partnership will be voidable where the respondent had obtained either an interim (s. 50(d)) or full Gender Recognition Certificate (s. 50(e)) prior to the ceremony, and the petitioner was unaware of this fact (s. 51(6)). In this regard, the Civil Partnership Act, like the Gender Recognition Act, seeks to maintain the hetero/homo binary and hierarchy, and to avoid any blurring of either category. This, of course, is consistent with the government's refusal to open up civil partnerships to all couples. On the possibility and desirability of extending civil partnerships to heterosexual people, see Cooper (2001).

[64] See, for example, *M.T. v. J.T.*, *supra* n. 4, at 205; *M. v. M.*, *supra* n. 11 at 348; *Re. Kevin*, *supra* n. 14 at paragraph 39.

[65] *Supra* n. 6.

sexual organs'' at the sight of which ''[h]e immediately left the bed'' and ''got drunk some more'',[66] a scene vividly captured in Neil Jordan's film *The Crying Game* (1992).[67] A similar concern was expressed about a post-operative male to female transgender woman in the House of Commons debates. Thus the Honourable Andrew Selous, concerned about the position of non-transgender parties to a marriage, informed the chamber that: ''in the case of Samantha Kane, she had five lovers and did not tell any of them that she used to be a man''.[68] The horror produced by this account is also captured in the House of Lords debates. Thus, in voicing her concern over privacy restrictions introduced by the Act,[69] Baroness O'Cathain expressed the view: ''it seems that it would be an offence [for a member of the clergy] to warn a bridegroom if he did not know that his bride-to-be was really a man''.[70]

The nexus between non-disclosure of gender history and anxiety over the possibility of the presence of homosexuality within marriage is again apparent in the English decision of *S.T. (formerly J.) v. J.*[71] In this case, J., a female to male transgender man, who had been 'married' to a biological woman for seventeen years, but had been found to be female for the purposes of marriage law, applied for ancillary relief under the Matrimonial Causes Act 1973.[72] It was the merits of this application that both the trial judge and, on appeal, the Court of Appeal, had to determine. In dismissing the defendant's appeal, the Court of Appeal held that:

---

[66] *Ibid* at 499.

[67] For an analysis and critique of the film see, for example, Morkham (1995).

[68] *Supra* n. 44, 11 March 2004, Col. 166.

[69] Section 22(1) creates an offence ''for a person who has acquired protected information in an official capacity to disclose the information to any other person''.

[70] House of Lords Report Stage, 29 January 2004, Col. 657.

[71] *Supra* n. 6. For a detailed analysis and critique of decision see Sharpe (2002c).

[72] *Ibid* at 433. The marriage between S.T. and J. had broken down and S.T. commenced divorce proceedings. S.T. claimed that it was only at this stage, due to the production of J'.s birth certificate for the purposes of hearing her divorce petition, that she became aware of J'.s gender history. As a consequence S.T. presented a petition seeking a decree that the ceremony of marriage should be declared null and void under s. 11(c) of the Matrimonial Causes Act 1973, on the ground that at the time of the ceremony the parties were not respectively male and female.

[J.] had committed a serious crime: he had deceived the plaintiff into the marriage ... His conduct at the time of the marriage, when judged by principles of public policy, brought down the scales overwhelmingly against the grant of relief.

In evaluating J'.s conduct in public policy terms, and in concluding that J'.s act of 'perjury' had crossed the threshold of seriousness, thereby invoking the principle of public policy and barring ancillary relief, the Court of Appeal noted that there was "a present public interest in buttressing and protecting the institution of marriage".[73] Like the trial judge, Hollis J., the Court of Appeal took the view that the 'deception' perpetrated by J. against S.T., one "as profound a betrayal of trust as between two people as can be imagined",[74] went to "the heart of marriage"[75] given that "single sex unions remain proscribed as fundamentally abhorrent to [the] notion of marriage".[76]

Of course, by virtue of the Gender Recognition Act, such a union is no longer viewed as a single sex union under the Matrimonial Causes Act 1973. Accordingly, such marriages can no longer be declared void. Nevertheless, rather than leaving the parties to institute divorce proceedings, as some jurisdictions do in non-disclosure type situations,[77] the Gender Recognition Act adds non-disclosure of gender history to the limited list of situations under the Matrimonial Causes Act 1973 where a party may apply to the court to have a marriage annulled.[78] The implication is clear. Non-disclosure of

[73] *Ibid* at 465.

[74] *Ibid* at 441.

[75] *Ibid* at 442.

[76] *Ibid* at 465.

[77] See, for example, the Australian Family Law Act 1975 and the New Zealand Family Proceedings Act 1980. See also the discussion of this issue in *Attorney-General v. Otahuhu Family Court, supra* n. 13, at 613 per Ellis J. The law "relating to marriage draws an important distinction between those marriages which are annulled and those which are ended by divorce. Where the marriage is annulled the law recognizes that there has been some flaw in the establishment of the marriage, rendering the marriage ineffective (Herring 2001, p. 35). In contrast to divorce, nullity enables early exit. For unless a petitioner can prove adultery, desertion or unreasonable behaviour, s/he will have to wait two, and if the divorce application is contested, five years to get out of the marriage (Herring 2001, pp. 83–87). However, as Cretney, Masson and Bailey-Harris note, "the law of nullity is now comparatively unimportant as a method of dealing with the breakdown of a matrimonial relationship: in 1988 there were only 474 nullity decrees, compared with 143,879 decrees of divorce" (2002, p. 38).

[78] Schedule 4, paragraph 5.

gender history is viewed in the eyes of English law as a profound breach of trust. It is not clear how, other than through the lens of homophobia, a provision pertaining to non-disclosure of gender history, one that amounts to nothing less than a form of institutionalised outing, can be comprehended.

In addition to non-disclosure of gender history the Matrimonial Causes Act contains six other grounds for classifying a marriage as voidable. Putting to one side grounds arising out of a physical or mental incapacity,[79] this legislation contains three grounds that pertain to conduct. These address situations where a party was, at the time of the marriage, ''suffering from venereal disease in a communicable form'',[80] ''was pregnant by some other person other than the petitioner''[81] or did not consent due to duress

[79] Sections 12(a), (b) and (d) deal, respectively with non-consummation, wilful refusal to consummate and mental disorder. In relation to transgender people, it might be argued that post-operative sexual intercourse falls short of consummation on the basis that it is ''partial and imperfect'' rather than ''ordinary and complete'' (*D.-e. v. A.-g. (orse D.-e.)* [1845] 1 Rob. Eccl. 279 at 299; *Corbett v. Corbett*, *supra* n. 2 at 49). This is perhaps, especially the case regarding female to male transgender men who have undergone phallopasty, given the difficulties associated within this type of surgery (see Walters et al. 1986). Accordingly, a biological woman who marries a female to male transgender man aware of his gender history, might claim subsequently, and despite the fact that the parties to the marriage had sexual intercourse, that the marriage has not been consummated in a technical sense. This problem is especially evident in relation to pre-operative transgender persons recognised under the Gender Recognition Act. Moreover, the equitable bar on nullity proceedings that applies, in some circumstances, where the petitioner was aware of the relevant facts at the time of the marriage ceremony, does not apply to non-consummation (s. 13(3)). Further, the absolute bar on bringing nullity proceedings after a three year period does not apply to the ground of non-consummation (s. 13(2)). Finally, a transgender person is unlikely to be able to benefit from s. 13(1) because while the petititioner might have ''lead the respondent to believe'' that he would not seek to avoid the marriage, it would be difficult to prove that granting a decree of nullity would ''be unjust to the respondent''. This difficulty arises out of the fact that financial provision is available on a decree of nullity (see *D. v. D.* [1979] Fam. 70). While non-consummation of a marriage is a ground for annulment for both transgender and non-transgender persons, it would seem that transgender people are vulnerable as a class to reliance on this ground. The solution however, is perhaps simply to abolish non-consummation as a ground for annulment as has occurred in other jurisdictions (*supra* n. 77).

[80] Section 12(e).

[81] Section 12(f).

or mistake.[82] In relation to sexually transmitted disease, a public policy interest in protecting the party lacking knowledge from physical harm can be readily discerned. In relation to pregnancy, explanation for the provision lies, perhaps, in concern over uncertain paternity and lineage.[83] It is not clear what harm, if any, arises where a transgender person chooses not to disclose their gender history, other than a perceived challenge to heterosexual identity and the heterosexual nature of marriage. Indeed, in *S.T. (formerly J.) v. J.* the court noted that the effect of non-disclosure on S.T., who had stated that she "was not into women",[84] had been "catastrophic and that she has been traumatized by the experience".[85] Moreover, while non-disclosure of gender history can be juxtaposed with non-disclosure of a sexually transmitted disease or pregnancy prior to a marriage, it may be that the former operates as a more profound transgression. Thus, and thereby highlighting further the homophobia of law, Ward L.J. expressed the view that he "would be very slow to allow an appeal to public policy striking out a claim for ancillary relief"[86] in circumstances

[82] Section 12(c). Infertility, which might be thought to be a relevant policy consideration informing a requirement for disclosure of gender history, is not a ground for rendering a marriage voidable. It should be noted that under the Act, and in relation to the grounds of venereal disease, pregnancy by a third party and lack of consent, it is an absolute bar to the granting of a decree that proceedings were not instituted within three years of the marriage (s. 13(2)). It is also a bar in relation to venereal disease and pregnancy by a third party that the petitioner was aware of such facts at the time of the marriage. These bars also apply to the new ground of non-disclosure of gender history by virtue of schedule 4, paragraph 6 of the Gender Recognition Act.

[83] A concern over paternity is a long-standing one within English law, especially in the context of inheritance (see Bracton 1997, pp. 75–76, 95 (Vol. 2); pp. 156, 248, 288 (Vol 3); pp. 283 300–301, 305 (Vol 4)) http://hlsl.law.harvard.edu/bracton/Common/index.html

[84] *Supra* n. 6 at 439.

[85] *Ibid* at 456. Judicial concern over the effect of non-disclosure of gender history on the sexual identity of the party lacking knowledge is particularly notable in the case of Sean O'Neill (born Sharon Clark), a biological female who was charged with 11 felony counts of sexual assault, criminal impersonation of the opposite gender and sexual assault on a child due to sexual intercourse with an under age girl (*State of Colorado v. Sharon Clark*). Here non-disclosure of gender history is treated as tantamount to rape. For further discussion of the Sean O'Neill case see Califia (1997, pp. 234–237) and Minkowitz (1995). For an English case very similar on the facts see the case of Jennifer Saunders (*R. v. Saunders*, unreported, Pink Paper 196, 12 October 1991).

[86] *Supra* n. 6 at 466.

where non-disclosure related to, amongst other things, a sexually transmitted disease or pregnancy. This judicial posture contrasts significantly with the approach adopted in *S.T. (formerly J.) v. J.*

Turning to the other conduct-based ground for rendering a marriage voidable, namely, lack of consent due to duress or mistake, it might appear to cover the scenario envisaged by the Gender Recognition Act. In other words, and while duress is clearly inapplicable, a party to a marriage might claim that s/he did not consent to the marriage on account of the fact that s/he remained, at the time of the marriage, unaware of the other party's gender history. Yet, as Cretney, Masson and Bailey-Harris note, there are "only two groups of case in which mistake has been held sufficient to vitiate consent to marriage" (2002, p. 61).[87] These are 'mistake as to the person'[88] and 'mistake as to the nature of the ceremony'. It is only the former that concerns us here. A crucial legal distinction that arises is one between mistake as to the person and mistake as to an attribute of the person. In the latter instance, the party lacking knowledge is presumed to consent. By way of example, if a party to the marriage enters the contract wrongly believing the other party "to be a chaste virgin of good family and possessed of ample wealth the marriage will be unimpeachable" (Cretney et al. 2002, p. 61).

Thus it might be argued that non-disclosure of gender history provides a basis for claiming that a marriage was entered into under a fundamental mistake as to person. Yet, such a claim could only succeed if a transgender person's representation of gender at the time of a marriage could be said to be an impersonation. This possibility, always problematic in transgender contexts, is clearly foreclosed by the Gender Recognition Act. After conferral of a full Gender Recognition Certificate, no subsequent marriage can be objected to on the basis of a mistake as to person. For in order to entertain such a claim it would be necessary to conclude that a person, legally recognised as female by virtue of the Gender Recognition Act, is not female in some important sense, at the time of the marriage ceremony. When a male to female transgender woman, possessing a

[87] See also Herring (2001, p. 51). In the Australian case of *C. v. D. (falsely called C.)* [1979] 35 F.L.R. 340 the court held that a biologically female wife had made a mistake as to person in marrying an hermaphrodite whom she believed to be a biological man.

[88] A marriage would be voidable on this basis if a party to the marriage thought the person they were marrying was someone else, such as, in circumstances of impersonation (see, for example, *Militante v. Ogunwomoju* [1993] 2 F.C.R. 355).

recognition certificate stating that she is female, stands before a man at a wedding ceremony and asserts that she is a woman, such a statement is unquestionably correct in law. It is precisely this fact, and therefore the inapplicability of the mistake ground in the Matrimonial Causes Act to the issue of non-disclosure of gender history, that accounts for the legislative accretion to that Act contained within the Gender Recognition Act. Thus the Gender Recognition Act, through amending the Matrimonial Causes Act, effectively overcomes the difficulties associated with establishing mistake at common law. That is to say, in the context of gender history, the nature of the mistake made need not be one as to the person who is physically present at the ceremony. Rather, where there had previously been no basis at common law for concluding that there had been a mistake recognisable by law for the purposes of annulling a marriage, the law now recognises non-disclosure of attribute or circumstance as sufficient warrant. This is a remarkable departure from common law conceptualisations of the category of mistake.

More significantly, for the purposes of this article, while the law disavows the possibility of a mistake as to person in this particular transgender context, the amendment to the Matrimonial Causes Act produces the same effect. By same effect, I am not referring to the common outcome of an annulment. Rather, I am suggesting that the notion of mistake as to person informs and structures the amendment. How else can the amendment be understood, other than in terms of a legal concern over some kind of prior identity? In this sense the amendment serves to cast doubt on the very move that the Gender Recognition Act might be viewed as inaugurating, namely, a shift from sex to gender. Moreover, this is not to say that sex as anatomy trumps gender, but rather that gender is trumped by a legal understanding of sex as biology in the sense of chromosomes. The move is no doubt informed by the homophobia of law. The effect however, is to reveal a degree of ambivalence about the work performed by the Gender Recognition Act. While Gender Recognition Certificates are now being issued, and while, in principal, anatomical form is irrelevant to such outcomes, it would appear that behind these facts lies an unassailable 'truth'. In effect, law has granted transgender people an amnesty, and in relation to pre-operative bodies in particular has developed amnesia. Yet, in the context of the marriage contract, law has reserved the power to retract its amnesty and to remember the biological 'truth' about sex. While we may desire

to wish away a biological understanding of sex it is clear that law, at least not yet, and not in relation to marriage, is not prepared to do so. Through the issue of non-disclosure of gender history, we glimpse that an ostensible commitment of the law to present surgical and/or psychological realities is rendered inauthentic. For in this context, legal concern over non-disclosure serves only to reinscribe the 'truth' of the past and the past as 'truth'.

Conclusion

This article has focused on the claim within recent critical legal scholarship that the Gender Recognition Act represents a fundamental shift away from sex toward gender. This claim is not without substance. In many notable ways the Act does move in this direction. Most obviously, and most dramatically, it appears to abandon any requirement of physical transformation of the body as a condition of legal recognition. In other words, the Act appears to transcend the prior reform test of *psychological and anatomical harmony*. I say appears because despite legal form it is clearly law's expectation that surgery will take place and because it remains unclear what impact refusal to undergo surgery will have on a diagnosis of gender dysphoria. However, the counter-reading of the Gender Recognition Act offered here does not rely on a legal form/substance dichotomy as its principal objection to the recent tendency to erase the concept of sex in analyses of transgender/law relations. To do so would serve only to draw attention to law's concern for anatomically 'correct' bodies. While this would, of itself, act as a significant brake on the jettisoning of the concept of sex within critical legal scholarship, my primary argument is that a biological understanding of sex is reproduced by the Gender Recognition Act. In other words, it is my contention that the ostensible primacy given to gender in the Act is undercut by a legal concern over sex, not only in the anatomical, but in the biological sense. In this regard the Gender Recognition Act embodies a tension between gender and sex.

Transgender reform jurisprudence has been structured by the twin legal desires of reproducing the gender order and insulating marriage and heterosexuality from the stain of homosexuality. While the former desire foregrounds gender, the latter accounts for the return of sex. Accordingly, these desires exist in a state of tension. Recognition of this fact contributes to an understanding of the limits of, as well as

law's ambivalence toward, reform. Each moment of common law or legislative reform can be seen in terms of a playing out of these desires leading to a series of alternative 'resolutions'. In the context of the Gender Recognition Act, it is through the legislative provision rendering non-disclosure of gender history a ground for annulment of marriage that we witness the return of sex. Thus while recognising a male to female transgender woman as female for the purposes of law, ostensibly on account of her gender, it is clear that in the event of non-disclosure it is her sex, in the sense of her biological past, around which law constructs the 'truth'. For when faced with the ever-present possibility of inadvertent communion with the homosexual, law's commitment to incorporating transgender people within the gender order becomes more suspect. Accordingly, and while not seeking to diminish the important gains for transgender people that the Act affords, or to deny that the sex/gender dyad has in some significant senses been reconfigured, it is important to exercise caution before concluding that "for the purposes of the governmentability of gender, the body, and its biology, does not exist" (Sandland 2005, p. 52).

References

Barker, N., "For Better or For Worse? The Civil Partnership Bill [HL] 2004", *Journal of Social Welfare and Family Law* **26**/3 (2004), 313–324.

Billings, D.B. & Urban, T., "The Socio-Medical Construction of Transsexuality: An Interpretation and Critique", *Social Problems* **29** (1982), 266–282.

Bolin, A., *In Search of Eve: Transsexual Rites of Passage* (South Hadley: Bergin & Harvey, 1988).

Bracton, H., *On The Laws and Customs of England 1240–1260 Vols* 1–4, trans. S.E. Thorne (Buffalo: William S. Hein & Co, 1997).

Butler, J., *Undoing Gender* (New York: Routledge, 2004).

Butler, J., *Bodies That Matter: On the Discursive Limits of* '*Sex*' (New York: Routledge, 1993).

Butler, J., *Gender Trouble* (New York: Routledge, 1990).

Califia, P., *Sex Changes: The Politics of Trangenderism* (San Francisco: Cleis, 1997).

Cole, C.L. & Birrell, S., "Double Fault: Renee Richards and the Construction and Naturalization of Difference", *Sociology of Sport* **7** (1990), 1–21.

Collier, R., *Masculinity, Law and the Family* (London: Routledge, 1995).

Connell, R.W., *Gender and Power: Society, the Person, and Sexual Politics* (Stanford: Stanford University Press, 1987).

Cooper, D., "Like Counting Stars? Re-Structuring Equality and the Socio-Legal Space of Same-Sex Marriage", in *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*, eds. R. Wintemute & M. Andenaes (Oxford: Hart Publishing, 2001), 75–96.

Cowan, S., ''Gender is no Substitute for Sex: A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity'', *Feminist Legal Studies* **13** (2005), 67–96.

Cowan, S., ''That Woman is a Woman! The Case of Bellinger v. Bellinger and the Mysterious (Dis)appearance of Sex'', *Feminist Legal Studies* **12** (2004), 1–14.

Cretney, S.M., Bailey-Harris, R. & Masson, J.M., *Principles of Family Law*. (London: Sweet and Maxwell, 7th ed., 2002).

Dewar, J., ''Transsexualism and Marriage'', *Kingston Law Review* **15** (1985), 58–76.

Garber, M., ''Spare Parts: The Surgical Construction of Gender'', *Differences: A Journal of Feminist Cultural Studies* **1** (1989), 137–159.

Gatens, M., *Imaginary Bodies: Ethics, Power and Corporeality* (London: Routledge, 1996).

Gooren, L.J.G., et al., ''Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus'', *Journal of Clinical Endocrinology and Metabolism* **85** (2000), 2034–2041.

Gooren, L.J.G., et al., ''A Sex Difference in the Human Brain and its Relation to Transsexuality'', *Nature* **378** (1995), 68–70.

Griggs, C., *S/he: Changing Sex and Changing Genders* (New York: Berg, 1998).

Herring, J., *Family Law* (London: Longman, 2001).

Kaveney, R., ''Talking Transgender Politics'', in *Reclaiming Genders: Transsexual Grammars at the Fin de Siecle*, eds. S. Whittle & K. More (London: Cassell, 1999).

King, D., *The Transvestite and the Transsexual* (Aldershot: Avebury, 1993).

Lewins, F., *Transsexualism in Society: A Sociology of Male-to-Female Transsexuals* (South Melbourne: Macmillan Education Australia, 1995).

Minkowitz, D., ''On Trial: Gay? Straight? Boy? Girl? Sex? Rape?'', *Out Mag* (October 1995), 99.

Moi, T., *What is a Woman? And Other Essays* (Oxford: Oxford University Press, 1999).

Monro, S., *Gender Politics: Activism, Citizenship and Sexual Diversity* (London: Pluto Press, 2005).

Morkham, B., ''From Parody to Politics: Bodily Inscriptions and Performative Subversions in the Crying Game'', *Critical InQueeries* **1** (1995), 47–68.

Prosser, J., *Second Skins: The Body Narratives of Transsexuality* (New York: Columbia University Press, 1998).

Robertson, K.C., ''Note: Penetrating Sex and Marriage: The Progressive Potential of Addressing Bisexuality in Queer Theory'', *Denver University Law Review* **75** (1998), 1375–1408.

Robson, R., *Sappho Goes to Law School* (New York: Columbia University Press, 1998).

Sandland, R., ''Feminism and the Gender Recognition Act 2004'', *Feminist Legal Studies* **13** (2005), 43–66.

Sandland, R., ''Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights'', *Feminist Legal Studies* **11** (2003), 191–209.

Sharpe, A.N., ''Thinking Critically in Moments of Transgender Law Reform: *Re Kevin and Jennifer v Attorney-General for the Commonwealth*'', *Griffith Law Review* **11** (2002a), 309–331.

Sharpe, A.N., *Transgender Jurisprudence: Dysphoric Bodies of Law* (London: Cavendish, 2002b).

Sharpe, A.N, ''English Transgender Law Reform and the Spectre of Corbett'', *Feminist Legal Studies* **10** (2002c), 65–89.
Spelman, E., *Inessential Woman: Problems of Exclusion in Feminist Thought* (Boston: Beacon, 1988).
Stychin, C.F., ''Not (Quite) a Horse and Carriage: The Civil Partnership Act 2004'', *Feminist Legal Studies* **14**/1 (2006), 79–86.
Walters, W.A.W., Kennedy, T. & Ross, M.W., ''Results of Gender Reassignment: Is it all Worthwhile?'', in *Transsexualism and Sex Reassignment*, eds. W.A.W. Walters & M.W. Ross (Oxford: Oxford University Press, 1986).
Weinberg, G., *Society and the Healthy Homosexual* (New York: Doubleday, 1974).
Whittle, S., ''Gemeinschaftsfremden, or How to be Shafted by your Friends'', in *Legal Queeries: Lesbian, Gay and Transgender Legal Studies*, eds. L. Moran, D. Monk & S. Beresford (London: Cassell, 1998).
Whittle, S., *Respect and Equality: Transsexual and Transgender Rights* (London: Cavendish, 2002).
Young, I.M., *On the Female Bodily Experience: 'Throwing Like a Girl' and Other Essays* (New York: Oxford University Press, 2005).

School of Law
Keele University
Keele, North Staffordshire ST5 5BG
UK
E-mail: a.sharpe@law.keele.ac.uk